UNITED STATES v. ALEX BECHTHOLD

IBLA 76-145 Decided June 1, 1976

Appeal from decision of Administrative Law Judge Dean F. Ratzman declaring the Jumbo King, Jumbo King No. 1 and Jumbo King No. 5 lode mining claims null and void (Contest No. CA 446).

Affirmed.

1. Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

   Under the mining law, discovery of a valuable mineral deposit is the sine qua non for a valid mining claim. Even if location of a mining claim appears not to be supported by discovery, a cloud is cast upon the United States' title, which the Government may seek to remove by bringing a contest to determine whether the claim is valid.

2. Evidence: Burden of Proof--Mining Claims: Contests-- Mining Claims: Determination of Validity

   In a mining contest, the mining claimant is the proponent of a rule or order that he has complied with the mining laws entitling him to validation of the claim, and the claimant has the ultimate burden of proof. The Government has assumed the burden of going forward with sufficient evidence to establish a prima facie case of invalidity. When this has been done, the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid.

3. Mining Claims: Discovery: Generally

The "prudent man" test is the long-standing test to determine whether there has been a discovery of a valuable mineral deposit. To meet this test there must be sufficient mineralization within a claim to warrant a man of ordinary prudence to expend his time and means with a reasonable expectation of developing a valuable mine.

4. Administrative Procedure: Burden of Proof--Evidence: Burden of Proof--Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

In making a prima facie case of lack of discovery of a valuable mineral deposit, the Government has no duty to do the discovery work for the mining claimant. It is incumbent upon the claimant to keep his discovery points available for inspection. A prima facie case is established when a Government mineral examiner gives his expert opinion that he examined the claim and found insufficient values to support a finding of discovery.

5. Evidence: Generally--Evidence: Burden of Proof--Mining Claims: Contests--Mining Claims: Hearings--Rules of Practice: Evidence--Rules of Practice: Government Contests

Where the Government fails to present a prima facie case, a contestee, upon timely motion, may move to dismiss the case and then rest. If, however, he goes forward and presents evidence, that evidence will be considered as part of the entire evidentiary record. Therefore, even if the Government has failed to make a satisfactory prima facie case, or the case is weak, contestee's evidence may be used against him to establish that case. Furthermore, where contestee chooses to

rebut the case, he must do so by a preponderance of the evidence, bearing the risk of nonpersuasion if he fails.

6. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally--Mining Claims: Lode Claims

Occasional assay samples of material from a lode mining claim containing high values of gold are not conclusive evidence of a valid discovery. Other factors must be considered, such as the extent of the mineral deposits, the number of samples assayed showing only a trace of mineral, and the nature of the samples yielding the high values. To be meaningful, the samples must be representative of the mineral deposit, not simply selective showings of the best mineralization.

7. Mining Claims: Discovery: Generally--Mining Claims: Discovery: Geologic Inference

In determining whether there has been a discovery of a valuable mineral deposit under the mining laws, the mere showing of a vein (or veins) carrying some erratic mineral values is not sufficient to establish a valuable mineral deposit where the existence of such a deposit can only be inferred. Geological inferences may only be relied upon in evaluating the extent and potential value of a particular exposed mineral deposit under the prudent man test of discovery and may not be employed as a substitute for the actual finding of a mineral deposit.

8. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

Before a finding of discovery of a valuable mineral deposit within a mining claim is warranted, it must be shown as a present fact that the claim is valuable for minerals. Evidence of past profitable mining

is not proof the claims are presently profitable. The claim may have been worked out or have lost its value because of change in economic conditions.

9. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

Evidence of mineralization which may justify further exploration but not development of actual mining operations is not sufficient to establish that a discovery of a valuable mineral deposit has been made. The prudent man test is objective in nature. Therefore, a claimant's hopes and beliefs are not sufficient reasons to constitute a discovery. The facts must be such as would justify a prudent man to develop the claim.

10. Mineral Lands: Determination of Character of--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

A previous determination by the Department of the Interior in a proceeding different from a mining claim contest that land was mineral in character is not evidence of a discovery of a valuable mineral deposit in a mining contest.

APPEARANCES: Richard L. Bechthold, Esq., Sacramento, California, for appellant; Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, for appellee.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Alex Bechthold appeals from the July 21, 1975, decision of Administrative Law Judge Dean F. Ratzman, which declared Jumbo King, Jumbo King No. 1, and Jumbo King No. 5 lode mining claims null and void, these claims being located in portions of the SE 1/4 SE 1/4 and NE 1/4 NE 1/4, sec. 13, T. 17 N., R. 10 E., M.D.M., Nevada County, California.

Contest proceedings in this case were initiated at the request of the Forest Service through a complaint issued in the California State Office of the Bureau of Land Management, charging: (1) that

there were not disclosed within the boundaries of the mining claims minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery; and (2) that the land embraced within the claims was nonmineral in character. On October 24, 1973, depositions of four persons were taken. 1/ A hearing was held in Sacramento, California, on December 10, 1974. Subsequently, Administrative Law Judge Ratzman determined all three claims were null and void for lack of discovery of a valuable mineral deposit. Appellant attacks that conclusion and contends the claims are valid. He objects to this contest as a means of resolving a "trespass" dispute with the Forest Service. Basically, his appeal attempts to show weaknesses in the Government's case.

In his statement of reasons submitted upon appeal, appellant alleges Administrative Law Judge Ratzman erred: (1) in giving greater weight to the Government's evidence than that presented by the contestee; (2) in assuming that the contestee designated discovery points for the Forest Service's mineral examiner; (3) in concluding that the ore would have to be removed through No. 3 tunnel hundreds of feet by means of a wheelbarrow or on the miner's back; (4) in assuming that the costs of mining gold would be $ 35 per ton of ore; (5) in concluding that geological inference was an unacceptable means of proof; and (6) in reaching the conclusion that the possibility of profitable mining had evaporated on the basis of the difference between the 1939 final report and the results of samples taken within the last 5 years.

Appellant states it was his object to develop a mine and not merely to explore, asserting further that:

> * * * contestee has attempted to work toward developing a mine on the claims based upon assay reports supplied to him prior to his purchase of the claims and those which he had done. Contestee's purpose in acquiring and keeping the claims has been to develop a paying mine by utilizing the existing workings contained within the Jumbo King Lode and Jumbo King No. 1 Lode claims. Contestee has also extended his labor and means feeling secure in the idea that the government had already declared this land mineral in denying the patent application of an agricultural entry man.

We do not find any of appellant's arguments persuasive and affirm the Judge's decision.

1/ Any reference to these depositions within this opinion will be identified as D. Tr. followed by the last name of the deposed witness and the corresponding page number.

[1] The mining law provides that "all valuable mineral deposits in lands belonging to the United States * * * shall be free and open to exploration and purchase * * *." Act of May 10, 1872, as amended, 30 U.S.C. § 22 (1970). Under the mining law, discovery of a valuable mineral deposit is the sine qua non for a valid claim. Even where location of a mining claim does not appear to be supported by discovery, the recordation of a certificate or notice of location casts a cloud upon the United States' title to lands covered by the location. Davis v. Nelson, 329 F.2d 840 (9th Cir. 1964).

The location of a mining claim upon the public lands is, in effect, a unilateral act by the locator which indicates that, in his opinion, there are minerals upon the land susceptible to profitable exploitation. Such an assertion of discovery may be ill-founded. Therefore, the United States must be able to clear the title to those lands from such encumbrances. Mulkern v. Hammitt, 326 F.2d 896 (9th Cir. 1964). The Secretary of the Interior, acting through delegated subordinate officials, has the power and authority to entertain a Government contest so that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. Cameron v. United States, 252 U.S. 450 (1920). See Davis v. Nelson, supra; United States v. Al Sarena Mines, Inc., 61 I.D. 280, 283 (1954).

[2] In locating a mining claim and alleging discovery of a valuable mineral deposit, the mining claimant asserts a right and title to those lands superior to that of the United States. Therefore, he is the proponent of a rule or order that he has complied with the mining laws entitling him to validation of the claim. Consequently, when the Government contests a mining claim, it has by practice assumed only the burden of going forward with sufficient evidence to establish a prima facie case. The ultimate burden of proving a discovery is always on the mining claimant. That burden requires a showing, by a preponderance of the evidence, that the discovery test has been met by the claimant. United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975), cert. denied, U.S. (1976); United States v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); Converse v. Udall, 262 F. Supp. 583, 593 (D. Ore. 1966), aff'd, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); Foster v. Seaton, 271 F.2d 836, 837-38 (D.C. Cir. 1959); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975).

[3] The long-standing test to determine whether there is a discovery of a valuable mineral deposit is the "prudent man" test. To meet this test the mining claimant must establish there is sufficient mineralization within his claims in both quality and quantity to warrant a person of ordinary prudence to expend his

time and means with a reasonable expectation of developing a valuable mine. United States v. Coleman, 390 U.S. 599 (1968); Chrisman v. Miller, 197 U.S. 313 (1905), approving Castle v. Womble, 19 L.D. 455 (1894). See Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912). The value which sustains a discovery is such that with actual mining operations under proper management a profitable venture may reasonably be expected to result. United States v. White, 72 I.D. 522, 525 (1965), White v. Udall, 404 F.2d 334 (9th Cir. 1968).

[4] Appellant attempts to discredit Judge finding that the Government showed a prima facie case of lack of discovery on the claims. He claims the prima facie case consisted of three samples and some pictures, labeling the samples as being at best highly questionable by alleging that:

> One "sample" taken on August 7, 1972 was of some rocks which had fallen from an ore chute onto the floor of the tunnel and the "sample" taken by Mr. Jones [a Forest Service mining engineer] on March 13, 1973 was of some material, of which the origin is unknown, located outside the tunnel adit. These are not valid samples of anything.

Appellant argues further that the "chip" sample taken by Mr. Jones on August 7, 1972, also lacks value in disproving the validity of the mining claim, claiming that its low assay value was due to the taking of this [**12] sample from the side of the vein rather than through its width.

We cannot agree with this characterization of the prima facie case. At the hearing below, the Government's mineral examiner, Henry W. Jones, a mineral examiner for more than 20 years and a graduate geologist with extensive experience in hard rock and placer mining, testified he visited appellant's claims once in 1972, four times in 1973, and once in 1974 (Tr. 10). He testified that during his visit in August of 1972, appellant was present, and had designated his discovery points at that time; as a result, Mr. Jones took three samples (D. Tr. Jones 6). A chipped sample was taken across the width of a vein at a location where appellant indicated value would be found (Tr. 21). This assayed at $ 3.42 per ton based on the 1972 market value of $ 38 per ounce of gold (Ex. 6A). A grab sample, taken of material which had come from an upper adit and stope (Tr. 20), assayed at $ 2.28 per ton at the $ 38 market value of gold then (Ex. 6A). The third sample, taken in 1973, was a grab sample of material outside the adit, which Mr. Jones claims to be more or less representative of the materials

obtained from the mine and stockpile (Tr. 21). This assayed at $ 3.36 per ton on the 1973 scale of $ 42 per ounce (Ex. 6B). 2/

Despite appellant's assertion and testimony that Mr. Jones' chip sample was to the side of the vein (Tr. 91), Mr. Jones consistently testified that this sample was taken through the width of the vein and not off its side (D. Tr. Jones 11, Tr. 21, 30, 31). Mr. Jones further testified that during the 1972 visit, he recalled asking the appellant to show him other discovery sites besides the area where he had taken the chip sample, but that vein site was the only discovery point appellant would show him (Tr. 36).

Appellant testified the mineral examiners neither told him why they were there nor asked to see his discovery points. "[T]hey just wanted to look inside the mine and that was the end of it" (Tr. 92). Appellant claims he showed them the inside of the mine and explained to them just what he thought was vein matter. Appellant has not alleged there is mineralization anywhere within the claims other than within the workings the mineral examiners examined. Therefore, to the extent his testimony may be read as constituting a basis for an argument that the mineral examinations by the Government examiners were not sufficient, it is neither persuasive nor acceptable.

It is well established that the Government has no obligation to do the discovery work for the mining claimant or to do more than simply examine the claim to verify whether there is a discovery of a valuable mineral deposit located within its limits. To drill or otherwise establish the existence and extent of a mineral deposit sufficient to meet the prudent man test of discovery is the obligation of the mining claimant. Henault Mining Company v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970). See also United States v. Arcand, 23 IBLA 226 (1976); United States v. Hallenbeck, 21 IBLA 296 (1975); United States v. Clark, 18 IBLA 368 (1975); United States v. Winters, 2 IBLA 329, 78 I.D. 193 (1971).

Grab sampling is a rough and random mode of sampling often used to estimate the approximate value of material lying broken in stopes or headings, or of material coming from the mine. P. THRUSH, A DICTIONARY OF MINING, MINERAL, AND RELATED TERMS 502 (1968).

2/ For accuracy we have used the values reflected on the assay reports. Jones' testimony on the values is confusing, apparently because he attempted to recompute those values based on changed values of gold from the time of his deposition to the time of the hearing. Also, he misread one figure (Tr. 49-50). However, the increase in the gold price from the prices shown on the assay reports does not alter the conclusions reached in this decision.

Chip sampling is the taking of small pieces of ore along a line or at random across the width of a face exposure, such sampling often being confined to preliminary prospecting or exploration. Id. at 203-04. Considering the nature of the investigation and the degree of examination required by a mineral examiner to establish a prima facie case, the samples taken by Mr. Jones are not, as appellant contends, invalid samplings.

Furthermore, it is incumbent upon the mining claimant to keep his discovery points available for inspection by Government mineral examiners. United States v. Blomquist, 7 IBLA 351 (1972). If the claimant fails to keep his discovery points open and available, he assumes the risk that the mineral examiner will be unable to verify the discovery of the alleged mineral deposit. United States v. MacIver, 20 IBLA 352 (1975); United States v. Bass, 6 IBLA 113 (1972); United States v. Laing, 3 IBLA 108 (1971). It is evident from the record that some of the old workings were unsafe and not in any condition to be examined. Therefore, an alleged discovery of a mineral deposit within such workings could not be verified.

A sufficient prima facie case by the Government in a mining contest does not require positive proof there has been no discovery made or that the mining claim is nonmineral in character. United States v. Shield, 17 IBLA 91, 95 (1974); United States v. Blomquist, supra at 354. A prima facie case has been established when a Government mineral examiner gives his expert opinion that he has examined a claim and found the mineral values insufficient to support a finding of discovery, "provided that such opinion is formed on the basis of probative evidence of the character, quality and extent of the mineralization allegedly discovered by the claimant." United States v. Winters, supra at 335, 78 I.D. at 195. If his opinion is premised upon his belief or hypothetical assumption of the existence of certain relevant facts, and evidence is presented that such conditions exist, that is sufficient to establish a prima facie case. Id.

Based upon the information received from the assays and his examinations as to the condition of the claims, Mr. Jones concluded that a prudent man would not be justified in expending time and effort on the claims (Tr. 22). That conclusion was based upon observations which include the following: (1) the Jumbo King No. 1 contains veins which do not particularly lend themselves to commercial extraction due to the high cost of extraction plus milling costs (Tr. 23); (2) the Jumbo King has no vein structures exposed whatsoever (Tr. 23); (3) the condition of Tunnel No. 3, which services Jumbo King and Jumbo King No. 1 workings, precludes any mechanical means of recovering material from the inside of the adit (Tr. 13, 14); (4) the Jumbo King No. 5 claim has no portals

or operations or vein structures of any consequence (Tr. 23); and (5) the claims lacked an operational mill (Tr. 14). Mr. Jones estimated it would take values of at least $ 25 to $ 30 per ton to make a profit from a mine the size of the appellant's due to the extremely high cost of labor, materials, and the general nature of mining operations on the claims (D. Tr. Jones 16). He noted that the price of gold had greatly increased from the time his deposition had been taken to the time of the hearing, but felt the cost of operating a mine had increased proportionately with the value of gold. He concluded that such a mining operation would still be very much of an economic loss (Tr. 47, 48).

This testimony was sufficient to constitute a prima facie case. However, even if this evidence had not been sufficient, Gerald E. Gould, another qualified and experienced Forest Service mineral examiner, was called as a witness by the mining claimant's attorney and provided sufficient testimony to establish the necessary case. Mr. Gould examined the claims upon two occasions, once in the 1960's and again on July 21, 1971 (Tr. 70, 71). Based upon his review of the exhibits, he concluded that a prudent man would not be justified in spending time, money and effort on any of the contested claims with a reasonable expectation of obtaining a profitable mine (Tr. 80-82). Furthermore, contestee's own testimony which showed a lack of significant exploration or other activities on the claims since prior to World War II tends to corroborate the expert opinions of the mineral examiners that there is no discovery.

[5] It is well established that if the Government fails to present a prima facie case, a contestee, upon timely motion, may seek to have the case dismissed and then rest. 3/ United States v. Winters, supra. If, however, the contestee goes forward and presents his evidence, that evidence will be considered as part of the entire evidentiary record and weighed in accordance with its probative value. Therefore, even if the Government has failed to make a satisfactory prima facie case, or that case is weak, any evidence supporting that prima facie case presented by the contestee may be used to create or buttress that case. United States v. Taylor, supra at 19 IBLA 23-24, 82 I.D. at 73.

To reemphasize, we find, as did Judge Ratzman, that a prima facie case of lack of discovery has been established. The mineral examiners' opinions were based upon adequate investigation of the claims, and were sufficiently supported.

3/ If the Forest Service's evidence had failed to show lack of discovery on the claims, this would only negate the prima facie case. It would not entitle the contestee to a finding that the claims are valid. United States v. Winters, supra.

Appellant chose to rebut the prima facie case on the merits of the claim. He can only do so by a preponderance of countervailing evidence. As was noted before, in locating a mining claim, the claimant is the proponent of a rule or order that he has complied with the requirements of the mining law. He has the ultimate burden of proving discovery. Therefore, where the Government has made a prima facie case of lack of discovery, any doubt in the issue of discovery raised by the evidence must be resolved against the mining claimant. He bears the risk of nonpersuasion. United States v. Taylor, supra.

We must agree with the Judge's conclusion that appellant did not satisfactorily rebut the Government's case. We find no support for a finding that there is sufficient mineralization within the claim to warrant a mining operation. Appellant attempts to make much of the Judge's finding that the costs of the operation would be $ 35 per ton of ore (Dec. at 2). While there is no specific testimony on that figure, Mr. Jones during his deposition estimated there would need to be values of at least $ 25 to $ 30 per ton to mine the claims (D. Tr. Jones 16). At the hearing Mr. Jones stated that costs had risen "considerably" since that time because of increases in the cost of steel and fuel oil particularly (Tr. 49). Appellant's only evidence to the contrary is his statement that mining the claims would cost from $ 8 to $ 10 per ton (D. Tr. Bechthold 24). We agree with Judge Ratzman that this evidence is not persuasive. Indeed, appellant's contentions that his mining concept is much simpler and smaller in scale than that envisaged by Mr. Jones is not borne out by the record. To compare these claims with costs of operations on a large scale existing operation such as the Homestake Mine, which appellant does on appeal, cannot be done. There is no evidence which satisfactorily shows that this case is different from other small operations where costs per ton of ore generally are proportionately higher for a small scale underground operation than for a large scale existing operation. In view of the condition of the workings on the claim and other record evidence, we must conclude that the probable cost of an operation on these claims is nearer the $ 35 figure estimated by Judge Ratzman than the $ 8 to $ 10 figure given by appellant. In any event, the evidence fails to show sufficient mineralization to warrant the undertaking of a mining operation.

Appellant also attacked the Judge's conclusion that the minerals in the Jumbo King and Jumbo King No. 1 would have to be removed on the miner's back or in a wheelbarrow. The Government's witnesses testified this would be required because of the nature of the No. 3 tunnel (D. Tr. Pengilly 19, D. Tr. Jones 13). Appellant provided no evidence to the contrary, but testified on cross-examination as follows:

Q. Without anybody backing you, could you have mined these claims?

A. Yes, yes I could. I could have hauled it out with a wheelbarrow and pounded it out, the best I could.

(Tr. 129).

Therefore, appellant's contention that the Judge erred in this regard has no merit in view of the condition of the workings within the claims.

[6] Appellant relies on several of his assays which show high value. The record reveals that of the total of 26 relevant assays only 2 were over $ 25: one in 1952 for $ 26.70, and the other in 1968 for $ 141.61. 4/

Occasional high samples are not conclusive evidence of a valid discovery. Other factors must be considered, such as the extent of the mineral deposits, the number of samples assayed which show only a trace of mineral value, and the nature of the samples which yielded the high values. To be meaningful, the samples must be representative of the mineral deposit, not simply selective showings of the best mineralization. Cf. United States v. Pruess, A-28641 (August 22, 1961), aff'd, Pruess v. Udall, 410 F.2d 750 (9th Cir.), cert. denied, 396 U.S. 967 (1969).

The evidence reveals that the great majority of appellant's assays were quite low, as were the results of the assays taken by the Forest Service on the claims. An analysis of these samples has been adequately made in Judge Ratzman's decision and needs no reiteration. We simply emphasize that, in regard to the high value of the $ 141.61 assay in 1968, we agree with Judge Ratzman that this sample is not representative of the vein material in place, for the assay was of material taken from a drill hole not over 1-1/2 inches in diameter.

[7] For further evidence of discovery, appellant relied upon: (1) the results of "airplane readings" taken by his lessee 5/ who reported to him those readings revealed a vein 40 feet east of the

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4/ The record on appeal included 28 assay samples taken by the contestee. We have disregarded two taken in 1958, one for $ 166.10 and the other for $ 85.82 (Ex. 5D). Because these samples were submitted for assay in concentrate form, they are not probative evidence of the value of ore from the claim.

5/ The record reveals that the contested mining claims were leased to M. O. Gartten, a chiropractor from Santa Clara (Tr. 129).

Jumbo King No. 5 claim (Tr. 121, 122); and (2) a 1952 geological report of the Jumbo King Mine, concerning 12 unpatented mining claims (Ex. B). In particular, appellant relied on the attached copy of the 1939 final report of the milling of 587 wet tons of ore showing $ 4,109.83 worth of gold had been extracted.

In regard to the airplane readings, Judge Ratzman found (Dec. at 8):

> This is an indication that the mining claimant is still at the exploratory stage. The examination made by his lessee is preliminary, and could be tied to Jumbo King No. 1 only by geological inference. This is an unacceptable means of proof.

With regard to appellant's testimony concerning the airplane readings, we note that no details of the methods employed, of the readings themselves, or other detailed information concerning them was given. Without evidence which would establish what the readings measured and the validity and reliability of such readings in showing a mineral deposit, the testimony concerning them has no probative value whatever, either as evidence of the existence of minerals, or as a basis for drawing geological inferences as to their existence--if such an inference could otherwise be properly drawn.

Concerning the geological report, the Judge concluded (Dec. at 8):

> * * * when one considers the expense of rehabilitating the tunnel and installing a mill, and the fact that the gold recovery from samples taken in the last five years was much lower than that listed on the 1939 final report, the possibility of profitable mining evaporates.

Appellant, however, contends that the claims were located to take advantage of known vein systems and by using geological inferences the report shows the presence of the "quantity" of mineralization required for investment and operation of a mine. We disagree. The report may have warranted exploration for a mineral deposit within the claims, but it is not proof of the existence of such a deposit. Even when the information in the report is considered with the evidence that there are some spotty occurrences of mineralization within the claims, this is not sufficient to meet the discovery test. In determining whether there has been a discovery of a valuable mineral deposit under the mining laws, the mere showing of a vein (or veins) carrying some erratic mineral values is not sufficient to establish a valuable mineral deposit where

the existence of such a deposit can only be inferred. Geological inferences may only be relied upon in evaluating the extent and potential value of a particular exposed mineral deposit under the prudent man test of discovery and may not be employed as a substitute for the actual finding of a mineral deposit. United States v. Watkins, A-30659 (October 19, 1967), aff'd sub nom. Barton v. Morton, 498 F.2d 288 (9th Cir.), cert. denied, 419 U.S. 1021 (1974). There is simply insufficient evidence in this case, as in the Watkins-Barton case, concerning the nature of the mineralization within the claims which would warrant a prudent man to determine there is a reasonable prospect of developing a valuable mine by utilizing geological inferences.

[8] Furthermore, in regard to the 1939 final report of the milling of 587 wet tons of ore, it does not show that the extraction and sale of that ore was profitable. However, even if it did, evidence of past profitable mining is not proof that the claims may presently be profitably mined. Before a discovery can be established under the mining laws, it must be shown as a present fact that the claim is valuable for minerals. Adams v. United States, 318 F.2d 861, 870 (9th Cir. 1963). The exhaustion of the ore deposit or a change in economic conditions which makes mining unprofitable may cause the loss of a previous discovery on a claim. Adams v. United States, supra; Mulkern v. Hammitt, supra at 898; United States v. Denison, 76 I.D. 233 (1969),

[9] The evidence in this case does not establish that a mineral deposit of any consistent extent has been found on the contested claims. At most, further exploration may be warranted in an attempt to discover a valuable mineral deposit of sufficient quantity and quality which a prudent man would be justified in developing.

Appellant's witness, Forest Service mineral examiner Gould, testified that a prudent man would explore the veins within the contested claims, but there was presently nothing to mine. In his statement of reasons, appellant notes Mr. Gould's choice of the word "exploration" instead of "development." He contends there is no definite distinction between the two and where one leaves off and the other begins.

It is well established that there is a distinct difference between exploration and discovery under the mining laws, as the discussion in United States v. Watkins, supra, and Barton v. Morton, supra, demonstrated.

> * * * Exploration work is that which is done prior to discovery in an effort to determine whether the land

> contains valuable minerals. Where minerals are found, it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made * * *.

United States v. Converse, 72 I.D. 141, 149 (1965), aff'd, 262 F. Supp. 583 (D. Ore. 1966), aff'd, Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). While definitions may present some difficulties in distinguishing the practical effect, we see no difficulty in applying this distinction to the facts of this case.

Appellant contends it was his object in acquiring the claims to develop a paying mine, not merely to explore, and that he has "attempted to work toward developing" such a mine, based upon the assays he and the previous owners had taken. Appellant's intent to do something in the future is irrelevant. The prudent man test is an objective test, not subjective. Mere willingness on the part of a claimant to further expend his labor and means is not the criterion for discovery. The facts must be such as would objectively justify a prudent man to develop the property. Chrisman v. Miller, supra. A claimant's hopes and beliefs are not equivalent to the knowledge of the existence of valuable minerals. Castle v. Womble, supra at 457. Furthermore, it is very clear from appellant's testimony that apart from several samplings and assays, he has done nothing on the claims except perhaps to meet annual assessment work requirements.

[10] Lastly, appellant argues that he expended his labor and means feeling secure that the Government had previously declared his claims "mineral" when a patent application of an agricultural entryman was denied. The only evidence presented that there had been a determination of mineral character of the land were copies of some land status records that a railroad's selection application was challenged because of the mineral character and patent denied.

Appellant's mining claims were found null and void for failure of discovery. Judge Ratzman found it unnecessary to consider the second charge of the complaint that the lands were nonmineral in character. A finding that public lands were previously mineral in character does not constitute evidence of discovery. The tests, though somewhat similar conceptually, have different evidentiary

standards. Furthermore, a finding of mineral in character fails to reach the issues of sufficient quantity and quality required under the prudent man test. Converse v. Udall, 399 F.2d at 619. Also, changes in prices, costs, condition of the mine, etc., must be considered since the time the previous determination was made.

Appellant has failed to rebut the Government's prima facie case by a preponderance of countervailing evidence; therefore, the invalidity of his mining claims must be upheld.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Dean F. Ratzman declaring the Jumbo King, Jumbo King No. 1, and Jumbo King No. 5 lode mining claims null and void is affirmed.

Joan B. Thompson

Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Edward W. Stuebing
Administrative Judge